APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 00-3403

PENNSYLVANIA PSYCHIATRIC SOCIETY,
Appellant,

v.

GREEN SPRING HEALTH SERVICES, INC.;
MAGELLAN HEALTH SERVICES, INC.; HIGHMARK, INC.;
KEYSTONE HEALTH PLAN WEST, INC.; KEYSTONE HEALTH
PLAN CENTRAL, INC.; KEYSTONE HEALTH PLAN EAST, INC.

(D.C. Civ. No. 99-cv-00937)

Argued Oct. 31, 2000.
Filed: Feb. 6, 2002.

Before: SCIRICA, NYGAARD and BARRY, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

The Pennsylvania Psychiatric Society sued several managed health care organizations on behalf of its member psychiatrists and their patients. The gravamen of its complaint was that the managed health care organizations impaired the quality of health care provided by psychiatrists to their patients by refusing to authorize necessary psychiatric

treatment, excessively burdening the reimbursement process and impeding other vital care.

The principal issue on appeal is whether the Pennsylvania Psychiatric Society has properly pleaded associational and third-party standing. Finding the Society would require significant individual participation to establish its member psychiatrists' claims, the District Court dismissed its complaint for lack of associational standing.[1] The District Court also found the Society's member psychiatrists lacked third-party standing to pursue their patients' claims. As an alternative ground for dismissal, the District Court held the mandatory arbitration provision in the psychiatrists' contracts barred the Society from advancing their members' claims in court.

We believe the District Court's dismissal under Fed.R.Civ.P. 12(b)(6) was premature. For this reason, we will vacate and remand for further proceedings.

I.

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 because certain claims asserted by the Pennsylvania Psychiatric Society arose under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461.[2] We have jurisdiction under 28 U.S.C. § 1291.

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[1] The District Court adopted the Magistrate Judge's Report and Recommendation in full.

[2] The case was removed from state court under ERISA's civil enforcement provision, § 502(a)(1)(b), which preempts state court jurisdiction for claims by a plan participant "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B); *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 66, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 56, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987).

To discern which claims are preempted, "we embraced a distinction between claims pertaining to the quality of the medical benefits provided to a plan participant [that is, not preempted] and claims that the plan participant was entitled to, but did not receive, a certain quantum of benefits under his or her plan [that is, preempted]." *In re*

II.

The Pennsylvania Psychiatric Society, a nonprofit corporation representing licensed psychiatrists in Pennsylvania, filed suit on behalf of its member psychiatrists and their patients who subscribe to managed health care plans administered by Green Spring Health Services.

There are several defendants. Green Spring Health Services, Inc. provides a network of psychiatrists as well as administrative services for managed health care plans; Magellan Health Services, Inc. is its corporate parent. Keystone Health Plan West, Inc., Keystone Health Plan Central, Inc., and Keystone Health Plan East, Inc. are health maintenance organizations that contract with Green Spring Health Services to provide mental health and substance abuse services to their subscribers. Highmark, Inc. is the parent company of Keystone Health Plan West (these managed care organizations collectively are referred to as "the MCOs"). Green Spring Health Services, Magellan Health Services and

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U.S. Healthcare, Inc., 193 F.3d 151, 162 (3d Cir. 1999) (citing *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 357-58 (3d Cir. 1995)), *cert. denied sub nom., U.S. Healthcare, Inc. v. Bauman*, 530 U.S. 1242, 120 S.Ct. 2687, 147 L.Ed.2d 960 (2000). Explaining this distinction in the Supreme Court's lexicon, we recently restated our position that "challenges [to] the administration of or eligibility for benefits [i.e., quantity] ... fall[] within the scope of § 502(a) and [are] completely preempted...." *Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266, 273 (3d Cir. 2001). To this end, claims against HMO policies that purportedly delay care "fall within the realm of the administration of benefits." *Id.*

On behalf of its members' patients, the Pennsylvania Psychiatric Society alleges the MCOs implemented policies to discourage or prevent subscribers from using mental health services. Under § 502(a), "[r]elief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits." *Dedeaux*, 481 U.S. at 53, 107 S.Ct. 1549. In this case, the relief sought involves the administration of benefits, because it would change the quantum of mental health services provided. These allegations fall within the scope of ERISA's civil enforcement provision, and, therefore, removal was proper as ERISA completely preempts at least some of the claims alleged by the Pennsylvania Psychiatric Society on behalf of its members' patients.

Highmark choose which psychiatrists to credential to provide these services.

Green Spring Health Services administers the psychiatric and substance abuse services for the employee benefit plans provided by the health management organizations. For this purpose, it enters into contracts with psychiatrists (the "Provider Agreement") to form a provider network to service the plans. In particular, the Provider Agreement assures that Green Spring Health Services will not undermine the psychiatrists' responsibility to provide patients with the mental health services they require. For most disputes arising between credentialed psychiatrists and Green Spring Health Services, the Provider Agreement also contains a mandatory arbitration clause that requires exhaustion of internal review procedures before seeking binding arbitration.

Alleging the MCOs unfairly profit at the expense of the psychiatrists and their patients, the Pennsylvania Psychiatric Society asserts several tort and breach of contract claims for impeding necessary psychiatric treatment. The Pennsylvania Psychiatric Society contends the MCOs refused to authorize and provide reimbursement for medically necessary mental health treatment; interfered with patients' care by permitting non-psychiatrists to make psychiatric treatment decisions; violated Provider Agreements by improperly terminating relationships with certain psychiatrists; and breached the contractual duties of good faith and fair dealing by failing to timely pay psychiatrists and by referring patients to inconvenient treatment locations, thereby depriving some patients access to treatment.

On the basis of these allegations, the Pennsylvania Psychiatric Society claims the MCOs tortiously interfered with the psychiatrists' livelihood as well as the psychiatrist-patient relationship. In addition, the Society asserts the MCOs fraudulently misrepresented the quality of care their plans would provide to subscribers and the benefits psychiatrists would receive for providing their services. Finally, on behalf of its members' patients, the Society alleges the MCOs made false representations to their subscribers in violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Const. Stat. Ann. § 201-1 *et seq.* (West 2001).

The complaint sought declaratory relief, injunctive relief, and damages. The Pennsylvania Psychiatric Society does not appeal the dismissal of its damages claims.

The suit commenced in state court but was removed to federal court on grounds that ERISA preempted all or, at least, some of the Society's claims. Recommending dismissal, the Magistrate Judge issued a Report and Recommendation finding the Society lacked standing to assert the claims of its members and their patients. As an alternative ground for dismissal, the Magistrate Judge found the mandatory arbitration clause in the psychiatrists' contracts foreclosed advancing the claims in court. The District Court adopted the Magistrate Judge's Report. The Pennsylvania Psychiatric Society timely appealed.

III.

The Pennsylvania Psychiatric Society's ability to press the claims of its members and their patients initially hinges on whether it meets the constitutional requirements for associational standing. For its part, the Society seeks only to pursue claims on behalf of its members and their patients; it does not allege direct injury to itself.

Our review of a dismissal under Fed.R.Civ.P. 12(b)(6) for lack of standing is plenary. *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 261 (3d Cir. 2001); *Gen. Instrument Corp. v. Nu-Tek Elecs. & Mfg., Inc.*, 197 F.3d 83, 86 (3d Cir. 1999). On appeal, we must accept as true all material allegations of the complaint and draw all reasonable inferences in a light most favorable to plaintiff. *Maio v. Aetna, Inc.*, 221 F.3d 472, 481-82 (3d Cir. 2000). "'The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). Therefore, we may affirm the district court only if we believe that the association would be entitled to no relief under any set of facts consistent with its allegations. *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 434-35 (3d Cir. 2000); *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 262 n. 12 (3d Cir. 1998).

A.

To satisfy the "case or controversy" standing requirement under Article III, § 2 of the United States Constitution, a plaintiff must establish that it has suffered a cognizable injury that is causally related to the alleged conduct of the defendant and is redressable by judicial action. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (discussing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)); *The Pitt News v. Fisher*, 215 F.3d 354, 359 (3d Cir. 2000). Associations may satisfy these elements by asserting claims that arise from injuries they directly sustain. *See, e.g., Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299 n. 11, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). Absent injury to itself, an association may pursue claims solely as a representative of its members. *See, e.g., New York State Club Assn, Inc. v. City of New York*, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); *Pub. Interest Research Group of NJ, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997). By permitting associational standing, we "recognize[ ] that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Brock*, 477 U.S. 274, 290, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Jackson, J., concurring) (noting purpose of joining an association "often is to permit the association ... to vindicate the interests of all").

The Supreme Court has enunciated a three-prong test for associational standing. An association must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (permitting state agency that represented apple industry to challenge North Carolina statute); *see also Laidlaw Envtl. Servs.*, 528 U.S. at 181, 120 S.Ct. 693; *Hosp. Council v. City of Pittsburgh*, 949 F.2d 83, 86 (3d Cir. 1991).

The need for some individual participation, however, does not necessarily bar associational standing under this third criterion. *Hospital Council,* 949 F.2d at 89-90.

In this case, the MCOs concede the Pennsylvania Psychiatric Society satisfies *Hunt*'s first and second prongs. But echoing defendants' objections, the District Court found the psychiatrists' claims would require a level of individual participation that precludes associational standing. As noted, the Society has not appealed the dismissal of its damages claims. This is noteworthy because damages claims usually require significant individual participation, which fatally undercuts a request for associational standing. On this point, the Supreme Court has explained that

> "[w]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind."

Hunt, 432 U.S. at 343, 97 S.Ct. 2434 (quoting *Warth v. Seldin,* 422 U.S. 490, 515, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Because claims for monetary relief usually require individual participation, courts have held associations cannot generally raise these claims on behalf of their members. *E.g., Air Transp. Ass'n v. Reno,* 80 F.3d 477, 484-85 (D.C.Cir. 1996) (collecting cases); *Sanner v. Bd. of Trade,* 62 F.3d 918, 923 (7th Cir. 1995) (same). Specifically, the Supreme Court has counseled "that an association's action for damages running solely to its members would be barred for want of the association's standing to sue." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 546, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) (relying on *Hunt,* 432 U.S. at 343, 97 S.Ct. 2434). Had the Society continued to press its claims for damages on appeal, dismissal under Rule 12(b)(6) would be entirely appropriate.

The sole associational standing question remains whether, taking the allegations as true, the Pennsylvania Psychiatric Society's requests for declaratory and injunctive relief will require an inappropriate level of individual participation.[3] We first addressed this question in *Hospital Council of Western Pennsylvania v. City of Pittsburgh,* where an association alleged that certain city and counties threatened to discriminate against nonprofit hospitals on taxation, zoning, and contract matters if the hospitals refused to make voluntary payments in lieu of taxes. 949 F.2d 83. Interpreting *Hunt*'s third prong through the prism of earlier Supreme Court jurisprudence, we rejected the city's argument that some individual participation violated this requirement.[4] *Id.* at 89. Explaining the circumstances on which this conclusion rested, we concluded:

> [T]he claims asserted by the Council would require some participation by some Council members. This case, unlike many prior associational standing cases, does not involve a challenge to a statute, regulation, or ordinance, but instead involves a challenge to alleged practices that would probably have to be proved by evidence regarding the manner in which the defendants treated individual member hospitals. Adjudication of such claims would likely require that member hospitals provide discovery, and trial testimony by officers and employees of member hospitals might be needed as well. Nevertheless, since participation by "each [allegedly] injured party" would not be necessary, we see no ground for denying associational standing.

Id. at 89-90.

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[3] Individual participation by an association's membership may be unnecessary when the relief sought is prospective (i.e., an injunction or declaratory judgment). *See Brock,* 477 U.S. at 287-88, 106 S.Ct. 2523; *Ark. Med. Soc'y, Inc. v. Reynolds,* 6 F.3d 519, 528 (8th Cir. 1993); *Action Alliance of Senior Citizens v. Snider,* No. Civ. A. 93-4827, 1994 WL 384990, at *3 (E.D.Pa. July 18, 1994) ("[P]articipation of individual members is rarely necessary when injunctive relief rather than individual damages is sought. *Hospital Council,* 949 F.2d at 89. This particularly true where ... a broad based change in procedure rather than individualized injunctive relief is sought.").

[4] In its brief, Keystone suggests reasons why individual participation would be required.

The Court of Appeals for the Seventh Circuit subsequently adopted our interpretation of *Hunt*'s third prong in *Retired Chicago Police Association v. City of Chicago,* where the Retired Chicago Police Association sued the city to bar implementation of increased health care premiums. 7 F.3d 584 (7th Cir. 1993). In this drawn-out litigation, the Retired Chicago Police Association represented city employees who allegedly had been guaranteed subsidized health coverage. When the city attempted to raise the coverage price because of escalating costs, the employees claimed the city reneged on its promise and sued. Believing the allegations would require individual participation, the district court concluded the association lacked standing. *Id.* at 600-01. Relying on *Hospital Council,* the court of appeals reversed and remanded, holding the association could attempt to establish its allegations with limited membership participation.[5] *Id.* at 602-03.

The MCOs argue the medical coverage decisions on psychiatric care and substance abuse services, which form the basis of the organization's allegations, are fact-intensive inquiries. For this reason, they assert the examination of medical care determinations will demand significant individual participation. To buttress this point, defendants note they offer subscribers various health care plans that in turn provide varying benefits. Consequently, they argue, demonstrating any single coverage decision violated their obligations will entail a case-by-case examination of a patient's condition along with the corresponding available benefits. In support, defendants rely on *Rent Stabilization Association v. Dinkins,* where an association of landowners alleged rent regulations constituted an unconstitutional taking of their property. 5 F.3d 591 (2d Cir. 1993). There, the Court of

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[5] The Court of Appeals for the Seventh Circuit stated:

> We believe that the approach of the Third Circuit is a sound one. We can discern no indication in *Warth, Hunt,* or *Brock* that the Supreme Court intended to limit representational standing to cases in which it would not be necessary to take any evidence from individual members of an association.... Rather, the third prong of *Hunt* is more plausibly read as dealing with situations in which it is necessary to establish "individualized proof," 432 U.S. at 344, 97 S.Ct. 2434, for litigants not before the court in order to support the cause of action. 7 F.3d at 601-02.

Appeals for the Second Circuit held that the extensive individual testimony required to adjudicate the claims would violate *Hunt*. *Id.* at 596; *see also Reid v. Dep't of Commerce,* 793 F.2d 277, 279-80 (Fed.Cir. 1986) (holding union lacked standing to assert back pay claims for its members because each claim depended on member's individual circumstances). The court reasoned the claims foreclosed standing because it

> would have to engage in an ad hoc factual inquiry for each landlord who alleges that he has suffered a taking. [The court] would have to determine the landlord's particular return based on a host of individualized financial data, and [the court] would have to investigate the reasons for any failure to obtain an adequate return, because the Constitution certainly cannot be read to guarantee a profit to an inefficient or incompetent landlord.

Rent Stabilization, 5 F.3d at 596. But the Court of Appeals for the Second Circuit has not rejected associational standing where only limited individual participation by some members would be required. *See N.Y. State Nat'l Org. for Women v. Terry,* 886 F.2d 1339, 1349 (2d Cir. 1989) (association warranted standing although evidence from some individual members necessary); *see also Nat'l Assn of Coll. Bookstores, Inc. v. Cambridge Univ. Press,* 990 F.Supp. 245, 249-50 (S.D.N.Y.1997). We agree that conferring associational standing would be improper for claims requiring a fact-intensive-individual inquiry.

The District Court reviewed the Pennsylvania Psychiatric Society's allegations—overly restrictive treatment authorizations; care determinations based on criteria besides medical necessity; creation of improper obstacles to physician credentialing; imposition of overly-burdensome administrative requirements; failure to pay psychiatrists for rendered services; direct interference with psychiatrist-patient relations—and found each assertion would necessitate significant individual participation. If this were true, the organization would not satisfy the associational standing requirements.[6]

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[6] Likewise, if the Pennsylvania Psychiatric Society continued to press damages claims on behalf of its members, it would not meet the requirements for associational standing. *See supra* p. 283.

But the Pennsylvania Psychiatric Society maintains the heart of its complaint involves systemic policy violations that will make extensive individual participation unnecessary. In effect, the Society contends the *methods* the MCOs employ for making decisions—e.g., authorizing or denying mental health services, credentialing physicians, and reimbursement—represent breaches of contract as well as tortious conduct. Therefore, insofar as its allegations concern *how* the MCOs render these decisions, the Society's complaint "involve[s][] challenge[s] to alleged practices," *Hospital Council,* 949 F.2d at 89, that may be established with sample testimony, which may not involve specific, factually intensive, individual medical care determinations. *See Virginia Hosp. Ass'n v. Baliles,* 868 F.2d 653, 663 (4th Cir. 1989), *aff'd on other grounds sub nom. Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

If the Pennsylvania Psychiatric Society can establish these claims with limited individual participation, it would satisfy the requirements for associational standing. While we question whether the Society can accomplish this, at this stage of the proceedings on a motion to dismiss for lack of standing, we review the sufficiency of the pleadings and "must accept as true all material allegations of the complaint and must construe the complaint in favor of the plaintiff." *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.,* 140 F.3d 478, 483 (3d Cir. 1998) (citing *Warth,* 422 U.S. at 501, 95 S.Ct. 2197). For this reason, we believe the Society's suit should not be dismissed before it is given the opportunity to establish the alleged violations without significant individual participation (as noted, if the damages claims remained, we would affirm the dismissal under Fed.R.Civ.P. 12(b)(6)). Moreover, as the organization concedes, if it cannot adequately demonstrate the MCOs' breaches with limited individual participation, its suit should be dismissed. Because this appeal arises on a motion to dismiss, the Pennsylvania Psychiatric Society should be allowed to move forward with its claims within the boundaries of associational standing. Therefore, we conclude that the District Court erred in dismissing the matter on this basis under Fed.R.Civ.P. 12(b)(6). Nevertheless, the District Court is free to revisit this issue.

B.

In addition to advancing the rights of its member psychiatrists, the Pennsylvania Psychiatric Society seeks to assert the claims of its members' patients who are also allegedly injured by defendants' practices. Because the patients are not members of, or otherwise directly associated with, the Pennsylvania Psychiatric Society, the Society does not have associational standing to assert their claims. Nonetheless, the Society maintains it may bring the patients' claims under the doctrine of third-party standing.[7] In particular, the Society contends its member psychiatrists have third-party standing to assert the claims of their patients, and the Society has standing to bring the claims of its members, including their third-party claims. Defendants have challenged both of these steps. Therefore, we must decide, first, whether the member psychiatrists have third-party standing to bring the claims of their patients, and second, whether the Pennsylvania Psychiatric Society has associational standing to assert these members' third-party claims.

1.

Apart from the constitutional requirements for standing,[8] courts have imposed a set of prudential limitations on the exercise of federal jurisdiction over third-party claims. *Bennett v. Spear,* 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) ("[T]he federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.") (quotation and citation omitted); *Warth,* 422 U.S. at 498, 95 S.Ct. 2197; *Powell v. Ridge,* 189 F.3d 387, 404 (3d Cir. 1999). The restrictions against third-party standing do not stem from the Article III "case or contro-

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[7] Third-party standing is also commonly known as *jus tertii* standing. *City of Chicago v. Morales,* 527 U.S. 41, 56 n. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); *The Pitt News,* 215 F.3d at 362 n. 6; *see also* Henry Monaghan, *Third Party Standing,* 84 Colum. L. Rev. 277, 278 n. 6 (1984) (explaining *jus tertii* standing).

[8] Under standing doctrine, a plaintiff must satisfy three constitutional preconditions: (1) a cognizable injury that is (2) causally connected to the alleged conduct and is (3) capable of being redressed by a favorable judicial decision. *Lujan,* 504 U.S. at 560-61, 112 S.Ct. 2130; *see also supra* pp. 282-83.

versy" requirement, but rather from prudential concerns,[9] *Amato v. Wilentz*, 952 F.2d 742, 748 (3d Cir. 1991), which prevent courts from "deciding questions of broad social import where no individual rights would be vindicated and ... limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99-100, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979); *see also Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 955, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984).

It is a well-established tenet of standing that a "litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 538 (3d Cir. 1994). This principle is based on the assumption that "third parties themselves usually will be the best proponents of their own rights," *Singleton v. Wulff*, 428 U.S. 106, 114, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (plurality opinion), which serves to foster judicial restraint and ensure the clear presentation of issues. *See Munson*, 467 U.S. at 955, 104 S.Ct. 2839.

Yet the prohibition is not invariable and our jurisprudence recognizes third-party standing under certain circum-

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[9] The Supreme Court has consistently held that standing to assert third-party rights is a prudential matter:

> [O]ur decisions have settled that limitations on a litigant's assertion of jus tertii are not constitutionally mandated, but rather stem from a salutary "rule of self-restraint" designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative.

Craig v. Boren, 429 U.S. 190, 193-95, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *see also Brown Group*, 517 U.S. at 557, 116 S.Ct. 1529; *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Singleton v. Wulff*, 428 U.S. 106, 123-24, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (plurality opinion); *Warth*, 422 U.S. at 499, 95 S.Ct. 2197; *Barrows v. Jackson*, 346 U.S. 249, 255, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

stances.[10] *Campbell v. Louisiana,* 523 U.S. 392, 397-98, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998); *see also Hodel v. Irving,* 481 U.S. 704, 711, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987) (acknowledging general rule that party must assert own interests is "subject to exceptions"). In particular, if a course of conduct "prevents a third-party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement," third-party standing may be appropriate. *United States Dep't of Labor v. Triplett,* 494 U.S. 715, 720, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990); *see also Munson,* 467 U.S. at 954-58, 104 S.Ct. 2839 (fundraiser had third-party standing to challenge statute limiting fees charitable organizations could pay because law infringed on organizations' right to hire fundraiser for a higher fee).

The Supreme Court has found that the principles animating these prudential concerns are not subverted if the third party is hindered from asserting its own rights and shares an identity of interests with the plaintiff. *See Craig,* 429 U.S. at 193-94, 97 S.Ct. 451; *Singleton,* 428 U.S. at 114-15, 96 S.Ct. 2868; *Eisenstadt v. Baird,* 405 U.S. 438, 443-46, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). More specifically, third-party standing requires the satisfaction of three preconditions: 1) the plaintiff must suffer injury; 2) the plaintiff and the third party must have a "close relationship"; and 3) the third party must face some obstacles that prevent it from pursuing its own claims. *Campbell,* 523 U.S. at 397, 118 S.Ct. 1419; *Powers,* 499 U.S. at 411, 111 S.Ct. 1364; *The Pitt News,* 215 F.3d at 362. It remains for courts to balance these factors to

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[10] For instance, doctors may be able to assert the rights of patients; lawyers may be able to assert the rights of clients; vendors may be able to assert the rights of customers; and candidates for public office may be able to assert the rights of voters. *See, e.g., Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 109 S.Ct. 2646 (1989) (holding lawyer could bring Sixth Amendment lawsuit on behalf of criminal defendant); *Singleton,* 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (conferring standing on physicians on behalf of patients to challenge a statute that excluded funding for abortions from Medicaid benefits); *Craig,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (allowing vendor to challenge statute that prohibited males under age of twenty-one from buying beer); *Mancuso v. Taft,* 476 F.2d 187 (1st Cir. 1973) (permitting candidate for public office to raise voters' rights).

determine if third-party standing is warranted. *Amato,* 952 F.2d at 750.

a.

Although the Pennsylvania Psychiatric Society itself has not suffered direct injury, it is uncontested that it properly pleaded that defendants' policies and procedures have economically injured its member psychiatrists and undermined their ability to provide quality health care. Thus, while the Society does not itself stand in an appropriate relationship to the patients' claims to directly assert them, its members may have third-party standing to do so.[11] And because plaintiff seeks to establish standing on the basis of its members' standing to bring these claims, the members are the appropriate focus of inquiry for these purposes.

b.

We next turn to whether the psychiatrists and their patients have a sufficiently "close relationship" which will permit the physicians to effectively advance their patients' claims. To meet this standard, this relationship must permit the psychiatrists to operate "'fully, or very nearly, as effective a proponent'" of their patients' rights as the patients themselves.[12] *Powers*, 499 U.S. at 413, 111 S.Ct. 1364 (quoting *Singleton,* 428 U.S. at 115, 96 S.Ct. 2868).

The patients' relationships with their psychiatrists fulfills this requirement. *See supra* note 12. In *Singleton v. Wulff*, the Supreme Court granted physicians third-party standing on

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[11] The District Court held—and the dissent argues—that the Pennsylvania Psychiatric Society could not raise these claims because it did not itself suffer injury. Injury to the Society, however, is not relevant to the issue of the psychiatrists' standing to bring the patients' claims. Because of the Society's posture, that is the initial question to be resolved. Only after it is determined that the member psychiatrists would have third-party standing over these claims do we assess whether the Society can bring its members' third-party claims. It is in the latter context that injury to appellant itself is a potential requirement, which we discuss below.

[12] Courts have generally recognized physicians' authority to pursue the claims of their patients. *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh,* 737 F.2d 283, 290 & n. 6 (3d Cir. 1984) (collecting cases where physicians allowed to assert patients' claims); *see also Planned Parenthood v. Farmer,* 220 F.3d 127, 147 & n. 10 (3d Cir. 2000).

behalf of their patients to challenge a statute prohibiting Medicaid funding for certain abortions. 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826. Because of the inherent closeness of the doctor-patient relationship, the plurality found the physicians could efficaciously advocate their patients' interests. *Id.* at 117, 96 S.Ct. 2868 (noting "abortion decision is one in which the physician is intimately involved"). The relationship forged between psychiatrists and their patients is equally compelling.

Psychiatrists clearly have the kind of relationship with their patients which lends itself to advancing claims on their behalf. This intimate relationship and the resulting mental health treatment ensures psychiatrists can effectively assert their patients' rights. Because the Pennsylvania Psychiatric Society alleges the MCOs prevent patients from receiving necessary mental health services and psychiatrists from providing them, its member psychiatrists would be well-suited to litigate these claims for both parties, as their interests are clearly aligned. *See Amato,* 952 F.2d at 751 (noting doctor-patient relationship provides strong likelihood of effective advocacy by a physician on behalf of his patients). Accordingly, we believe the psychiatrist-patient relationship would satisfy the second criterion for third-party standing.[13]

c.

Finally, we examine whether the mental health patients face obstacles to pursuing litigation themselves. This criterion does not require an absolute bar from suit, but "some hindrance to the third party's ability to protect his or her own interests," *Powers,* 499 U.S. at 411, 111 S.Ct. 1364. In other words, a party need not face insurmountable hurdles to warrant third-party standing.[14] *Id.* at 415, 111 S.Ct. 1364

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[13] The importance of the psychiatrist-patient relationship has been recognized in other settings too. In *Jaffee v. Redmond,* the Supreme Court upheld the evidentiary privilege for psychotherapist-patient communications. 518 U.S. 1, 10-15, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996).

[14] One treatise insists that "cases do not demand an absolute impossibility of suit in order to fall within the [impediment] exception. At the other end of the spectrum, a practical disincentive to sue may suffice, although a mere disincentive is less persuasive than a concrete impediment." 15 James Wm. Moore et al., *Moore's Federal Practice* § 101.51 [3][c].

(holding excluded juror's limited incentive to bring discrimination suit satisfied obstacle requirement for criminal defendant to merit third-party standing); *Singleton,* 428 U.S. at 117, 96 S.Ct. 2868 (recognizing lawsuit's invasion of patient's privacy and "imminent mootness" of pregnancy sufficiently impeded patient from bringing suit herself). The District Court found the patients' mental health problems did not significantly hinder them from suing. We disagree.

The stigma associated with receiving mental health services presents a considerable deterrent to litigation. *Cf. Parham v. J.R.,* 442 U.S. 584, 622, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (Stewart, J., concurring) ("There can be no doubt that commitment to a mental institution results in massive curtailment of liberty. In addition to the physical confinement involved, a person's liberty is also substantially affected by the stigma attached to treatment in a mental hospital.") (quotations and citations omitted); *Humphreys v. Drug Enforcement Admin.,* 96 F.3d 658, 662 (3d Cir. 1996) (noting "psychiatric patients suffer a stigma in society") (quotation and citation omitted). For example, the Supreme Court recognized in *Singleton* that the obstacles confronted by women in opposing an abortion statute were not overwhelming. In fact, the Court acknowledged the suit could have been brought pseudonymously or as a class. *Singleton,* 428 U.S. at 117, 96 S.Ct. 2868. The Court still concluded that a woman's desire to protect her privacy could discourage her from bringing suit and constituted a sufficient impediment. *Id.* at 117-18, 96 S.Ct. 2868. These concerns apply with equal, if not greater, force to mental health patients. *See Bd. of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 375, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) ("There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.") (Kennedy, J., concurring). Besides the stigmatization that may blunt mental health patients' incentive to pursue litigation, their impaired condition may prevent them from being able to assert their claims. Therefore, we believe the patients' fear of stigmatization, coupled with their potential incapacity to pursue legal remedies, operates as a powerful deterrent to bringing suit.

Because the third-party claims asserted by the Pennsylvania Psychiatric Society do not implicate any constitutional rights of the psychiatrists' patients, the MCOs contend that granting third-party standing is unwarranted. While successful third-party standing claims have involved alleged violations of third parties' constitutional rights, *Singleton* and its progeny have not stipulated that constitutional claims are a prerequisite.[15] It is true that the rule against third-party standing "normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth,* 422 U.S. at 509, 95 S.Ct. 2197. Furthermore, the Supreme Court has noted that courts must consider "the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests." *Caplin & Drysdale,* 491 U.S. at 623 n. 3, 109 S.Ct. 2646. But the Court has not held that a constitutional claim must also be alleged, *see, e.g., Powers,* 499 U.S. at 410-11, 111 S.Ct. 1364, and absent further guidance, we will not impose this requirement. For these reasons, we hold the Pennsylvania Psychiatric Society's member psychiatrists would have third-party standing to assert the claims of their patients.

2.

The Pennsylvania Psychiatric Society contends it has standing to bring these third-party claims just as it has standing to bring its members' other claims under the doctrine of associational standing. Defendants maintain the patients' claims are too attenuated from the Society to permit derivative standing.

We decline to adopt a per se rule barring such derivative claims. The Supreme Court did not delineate in *Hunt* which types of claims associations could bring on behalf of their members, but rather simply held that "an association has standing to bring suit on behalf of its members" when the

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[15] Simply raising a third party's constitutional claims will not in and of itself satisfy the requirements for third-party standing. For instance, a litigant may not assert a third party's Fourth Amendment rights against unreasonable search and seizure to prevent the admission of damaging evidence. *E.g., United States v. Payner,* 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980); *see also* Monaghan, *supra* note 7, at 305 n. 149.

requisite elements are established. *Hunt,* 432 U.S. at 343, 97 S.Ct. 2434.

The limitations on derivative standing, therefore, are to be determined by applying the test for associational standing specified in *Hunt*. Our holding that the Pennsylvania Psychiatric Society has alleged facts sufficient to establish the third-party standing of its members to bring their patients' claims implies the satisfaction of only the first requirement of the *Hunt* test—that "its members would otherwise have standing" to bring these claims. A third-party claim must also meet the requirements that "the interests it seeks to protect are germane to the organization's purpose" and that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* These factors inform the analysis whether an association stands in the correct relationship to a claim to allow it to assert that claim on behalf of others.

Other courts of appeals have adopted this approach in finding standing in similar cases. In *Fraternal Order of Police v. United States,* the Court of Appeals for the District of Columbia granted an organization derivative authority to assert the third-party claims of its members. 152 F.3d 998, 1002 (D.C.Cir. 1998) ("[T]he presence of [the chief law enforcement officers] as members gives the Order standing to make these [third-party] claims as well.").[16] The Fraternal Order of Police sued to contest the constitutionality of federal legislation that prohibited supplying firearms to police officers convicted of domestic violence. *Id.* at 1000-01. Because a chief law enforcement officer would be liable for supplying a firearm to a subordinate convicted of domestic violence and because the failure to supply a weapon could also violate the subordinate officer's rights, the court of appeals found the chiefs had third-party standing to advance the claims of their officers. *Id.* at 1002. Since the chiefs were members of the Fraternal Order of Police, the association had standing to advance the chiefs' claims as well as the

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16 The opinion containing the discussion of standing in Fraternal Order of Police was reversed on rehearing. *Fraternal Order of Police v. United States,* 173 F.3d 898 (D.C.Cir. 1999). In the second opinion, however, the court stated, "The analysis of standing on this issue is unchanged from our prior opinion." *Id.* at 903.

claims of their subordinates. Similar to this case, none of the members were themselves party to the suit.[17]

The Court of Appeals for the Sixth Circuit also granted an organization derivative authority to enjoin the enforcement of a statute requiring private schools to administer proficiency tests in *Ohio Association of Independent Schools v. Goff*, 92 F.3d 419, 421-22 (6th Cir. 1996). As parties to the litigation, the association's member schools had standing because failure to comply with the statute would result in the loss of their school charters. *Id.* at 422. The private schools also had third-party standing to assert the constitutional right of their students' parents to direct their children's education. Because its member schools could be injured by the statute, the Ohio Association of Independent Schools also had standing to assert their claims. Since its member schools had standing to assert the rights of the parents, the court held the Ohio Association of Independent Schools also had standing to sue on behalf of the parents whose children attended its members' schools. *Id.* ("The member schools ... have standing ... on behalf of parents of students who are threatened with the nonreceipt of diplomas. Consequently, the OAIS itself, as an organization dedicated exclusively to advancing the interests of the member schools, has associational standing to challenge the statutes at issue."). Thus, while some member schools—the intermediate parties—were parties to the dispute, the Sixth Circuit's standing analysis did not rely on that fact. We see a compelling analogy between these cases and the claims before us, and believe the Pennsylvania Psychiatric Society may have standing to assert its members' third-party claims.

The District Court found the Pennsylvania Psychiatric Society lacked derivative authority to pursue the claims of its members' patients because it had not suffered direct injury itself. On this point, defendants contend *Goff* is inapt because the Court of Appeals for the Sixth Circuit did not require that the association suffer injury in fact. *See Amato,* 952 F.2d at 749. This criticism is misplaced. It is generally true that

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[17] Contrary to the dissent, we believe *Fraternal Order of Police* supports recognition of the combination of associational standing and third-party standing, since the standing "bridge" in that case—the chief law enforcement officers—were not parties to the litigation.

third-party standing requires the party who advances the interests of another party to also suffer discrete injury. As noted previously, this prudential requirement sharpens presentation of claims and avoids litigation of general grievances. But when an association, which has not sustained direct injury, obtains standing to pursue the claims of its members, the association may rely on the injuries sustained by its members to satisfy the injury-in-fact requirement. Consequently, once an organization's members establish third-party standing, the prudential concerns are alleviated if the association also has authority to assert its members' claims.

It is a well-recognized anomaly of representational standing that the individuals who have sustained the requisite injury to satisfy the constitutional and prudential standing criteria are not in fact responsible for bringing suit. So long as the association's members have or will suffer sufficient injury to merit standing and their members possess standing to represent the interests of third-parties, then associations can advance the third-party claims of their members without suffering injuries themselves.[18] If on remand the Pennsylvania Psychiatric Society warrants associational standing to represent its members, we conclude it also may have derivative authority to raise the claims of its members' patients.[19]

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[18] In *Public Citizen v. FTC,* the Court of Appeals for the District of Columbia held Public Citizen and other organizations had standing to challenge an FTC regulation exempting certain promotional items from a statutory requirement that all advertisements for smokeless tobacco products carry certain health warnings. 869 F.2d 1541 (D.C.Cir. 1989). The court held the organizations had associational standing to assert the claims of their members. *Id.* at 1550. Additionally, the court held that members who were also parents had standing to advance claims for their children. The organizations thus had the derivative authority to assert the claims of their members' children as well. *Id.*

[19] Because the District Court held the Pennsylvania Psychiatric Society did not have standing to assert the claims of its members' patients, it found the organization itself did not fall within the "zone of interests" of the common law fraud or statutory fraud claims asserted on behalf of the psychiatrists' patients. Because we reverse and remand the District Court's judgment on associational and third-party standing, it will have to reconsider this issue.

IV.

We now consider the arbitration provision in the Provider Agreement between the MCOs and the psychiatrists.[20] The Pennsylvania Psychiatric Society argues that the District Court erred in holding all its claims were subject to mandatory arbitration. The Society contends the arbitration provision should not apply to its member psychiatrists for several reasons: (1) the arbitration provision is an unconscionable contract of adhesion; (2) the organization's broad-based claims are beyond the scope of the arbitration provision; (3) claims regarding the process of determining medical

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[20] The Provider Agreement provides in part:

> Section 10.1 Resolution of Disputes. In the event that a dispute between Green Spring and Provider arises out of or is related to this Agreement, the parties to the dispute agree to negotiate in good faith to attempt to resolve the dispute. In the event the dispute is not resolved within 30 days of the date one party sent written notice of the dispute to the other party, and if any party wishes to pursue the dispute, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association.... If the dispute pertains to a matter which is generally administered in accordance with Green Spring's procedures involving, for example, credentialing or quality assurance, the procedures set forth by Green Spring must be fully exhausted by Provider before Provider may invoke its right to arbitration under this Section.
>
> Provider acknowledges that the recommendation and determination of whether Health Services are Medically Necessary shall be made in accordance with Green Spring's policies and procedures and shall not be subject to this Section 10.

The Provider Agreement defines Medically Necessary Health Services as:

> Health Services including professional services and supplies rendered by a Provider to identify or treat an illness that has been diagnosed or is suspected, and which are: (a) consistent with (i) the efficient diagnosis and treatment of a condition; and (ii) standards of good medical practice; (b) required for other than convenience; (c) the most appropriate supply or level of service; (d) unable to be provided in a more cost-effective and efficient manner; and (e) unable to be provided at a facility providing a less intensive level of care. When applied to inpatient care, the term means: The needed care cannot be safely given on other than an inpatient basis.

necessity fall outside the purview of arbitration and pursuing these claims through the available internal review procedures would be futile; and (4) the psychiatrists with initial credentialing or re-credentialing claims do not have contracts with the MCOs requiring arbitration.[21]

Because it denied the Society associational and third-party standing to advance the claims of its members' patients, the District Court did not examine whether the patients' claims would be subject to mandatory arbitration. The District Court only reviewed the effect of the arbitration provision on the credentialed psychiatrists who are Society members. It strikes us that, assuming the Society has standing to assert the claims of each party, the District Court will have to re-examine the scope as well as the effect of the arbitration provision on all the parties involved. Because we find the Pennsylvania Psychiatric Society survives a motion to dismiss for lack of standing, the District Court must sort through, in the first instance, the impact of the psychiatrists' arbitration clause on the alleged claims.

V.

We will reverse and remand the dismissal of the Pennsylvania Psychiatric Society's complaint for lack of standing. Depending on the level of individual participation necessary to demonstrate its claims, the Society may have standing to press the claims of its member psychiatrists and their pa-

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[21] The District Court believed that these claims had all been settled, but the Pennsylvania Psychiatric Society maintains in its brief that these claims have not been addressed completely. Keystone also argues the association should be prohibited from asserting claims on behalf of psychiatrists that Green Spring Health Services has never credentialed because their claims are not present in the Pennsylvania Psychiatric Society's Amended Complaint. *See Pa. ex. rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988). In addition, defendants contend that the Pennsylvania Psychiatric Society has not asserted a single claim in its complaint on behalf of psychiatrists who have been denied credentialing by defendants. However, several of the allegations in the organization's amended complaint could arguably be read as asserting claims on behalf of this class of psychiatrists. Although the Amended Complaint is somewhat ambiguous, all these claims may be found woven throughout the allegations.

tients. Of course, we express no opinion as to the merits of any of the claims or defenses.

We will reverse the order of the District Court and remand for proceedings consistent with this opinion.

NYGAARD, Circuit Judge, dissenting:

I agree with much of what the majority has said. I part company, however, with its conclusion that grants PPS a hybrid-type of third-party derivative standing. PPS argues that it has standing to litigate, not the interests of its member-psychiatrists, but rather the issues and interests of its member-psychiatrists' patients—who are three steps removed from PPS. PPS's argument has three premises. Its first two premises are exceptions to the standing rule: 1) that PPS has associational standing to litigate on behalf of its member-psychiatrists; and, 2) that its member-psychiatrists have third-party standing to litigate on behalf of their patients. Its third premise is that these exceptions can be "stacked" to concoct a new exception to the standing rule. PPS thus concludes that it should have standing to litigate on behalf of its members' patients.

The first two premises are sound, but I disagree with the majority on the third. PPS cannot piggy-back two discrete *exceptions,* to swallow up the long-standing *rule* that litigants must assert their own rights and interests. I cannot find, nor does PPS cite, any authority for stacking or piggy-backing these relationships into an attenuated concatenation of exceptions to the standing rule so as to confer standing on PPS. I would hold that PPS cannot seek relief based upon the rights and interests of remote third parties. I must therefore respectfully dissent on this point.

Central to my conclusion is that PPS's third premise runs afoul of *Amato v. Wilentz,* 952 F.2d 742 (3d Cir. 1991), wherein we discussed the objectives and standards for third-party standing. Although third-party standing typically proves to be a nebulous prudential doctrine, sensitive to the particularities and peculiarities of the relationship between the parties and their claims, we distilled a basic test for third-party standing in *Amato. Id.* at 748-49. We require that the party seeking standing must first have suffered an injury in fact. If the party seeking standing has suffered an injury in

fact, the court must then examine further, considering: a) the intimacy of the relationship between the parties; b) any impediment the party might have to advancing its own rights; and c) the identity of the interests between the parties. *Id.* at 749.

Applying the *Amato* standards, the District Court first found that PPS did not itself suffer an injury. No one disputes this fact. I agree with the District Court that because PPS has not even alleged a concrete injury to itself, it cannot satisfy *Amato*'s most elementary standard. Standing should be denied to PPS on this test alone.

The District Court, however, continued and found that even if PPS had alleged an injury in fact to itself, *Amato*'s subsequent elements, or balancing tests, would not favor PPS third-party standing for its members' patients. The District Court found that the "relationship between PPS and the patient subscribers is so attenuated as to weigh against PPS to bring suit on behalf of persons with which it has no direct relationship." The District Court next found that "there appears to be no impediment to the patients seeking to enforce their legal claims themselves" and the patients face "no affirmative obstacle to sue[]." I agree with the District Court that even had PPS shown an injury-in-fact, the subsequent balancing test would not confer standing on PPS. The argument that psychiatric patients may face some impediment to bringing these claims themselves, because of the stigma attached to mental illness and psychiatric care, is mere speculation, and moreover, this factor is counterbalanced by the remoteness of the relationship between PPS and its members' patients. The relationship between PPS and the patients is nothing like the doctor/patient intimacy that supports that exception to the standing rule.

Thus the District Court held that PPS should be denied third-party standing for its member' patients for three distinct reasons: 1) PPS suffered no injury in fact and therefore the Court did not need to entertain the secondary balancing factors set forth in *Amato*; 2) even if PPS did merit consideration under the balancing test, the balancing test would not weigh in favor of granting standing since PPS's relationship with its members' patients is too attenuated; and 3) the patients have no substantial obstacle to bringing their claims independently. I agree with all three reasons, and

independently. I agree with all three reasons, and with the District Court's conclusion.

PPS argues to us that the District Court "ignored significant case law recognizing derivative third-party standing." Nonsense. None of the cases PPS cites are directly on point. PPS and its *amici* cite cases that confer standing to doctors to litigate on behalf of their patients. But this does nothing to advance PPS' argument on the "stacking" issue presented here. PPS cites both *American College of Obstetricians v. Thornburgh,* 737 F.2d 283 (3d Cir. 1984) and *Ohio Association of Independent Schools v. Goff*, 92 F.3d 419 (6th Cir. 1996), to support the notion that "an association may assert third-party claims that could be brought by its members." Neither of these cases stand for such a notion.

In *Ohio Association,* the association, along with several of its member schools, sought standing for parents of children in the schools to challenge the requirement of state formulated testing in private schools. *Ohio Association,* 92 F.3d at 421. The Court found that the "OAIS *member schools* also have standing to assert the constitutional right of parents to direct their children's education." *Id.* at 422 (emphasis added). Thus the Court did not find that the association had standing to assert parents' interests, but that individual schools had standing to do so. Thus the operative distinction between *Ohio Association* and PPS' argument is that in *Ohio Association* both the association and its individual members *jointly* brought the suit, but here, PPS attempts to bring its claims to court without the participation of *any* of its members.

American College presents the same problems for PPS. In *American College*, the challenge was brought by a team of an association, doctors, and medical providers. *American College,* 737 F.2d at 289. In a footnote the Court stated that the "district court concluded that plaintiff physicians, AGOG, and medical providers all had standing to raise their own interests (or the interests of members) and those of patients and customers in challenging the Act's constitutionality. We affirm this general conclusion." *Id.* at 290 n. 6. As in *Ohio Association,* the standing questions in *American College* turned on the doctors actually participating in the suit. The reason is obvious: The doctors provide the standing "bridge" between the association and the patients. All of the support

cited in *American College* demonstrates the need for physicians to participate in the suit to establish standing. *Id.* (citing *City of Akron v. Akron Ctr. for Reprod. Health,* 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (challenge by abortion clinics and a physician); *Planned Parenthood Ass'n v. Ashcroft,* 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983) (challenge by Planned Parenthood, two physicians and an abortion clinic); *Planned Parenthood v. Danforth,* 428 U.S. 52, 62, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (challenge by Planned Parenthood and two physicians); *Singleton v. Wulff,* 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (challenge by two physicians)).

Other cases demonstrate this need for a caretaker, such as a parent or advising officer, to be a party to the suit to provide the bridge between the association and the harmed individual. *See Fraternal Order of Police v. United States,* 152 F.3d 998 (D.C.Cir. 1998) (granting standing for an organization whose members included chief law enforcement officers based on the chief law enforcement officer's standing to advance the equal-protection rights of subordinate officers); *Public Citizen v. FTC,* 869 F.2d 1541 (D.C.Cir. 1989) (organizations had standing to challenge an FTC regulation that exempted certain promotional items from the requirement that advertising for smokeless tobacco products carry health warnings, since the members of the organizations included parents of children who might be injured by the lack of warnings).

In summary, I agree with the manner in which the District Court applied the *Amato* standard. I am convinced that PPS has neither successfully met (nor circumnavigated, as the case may be) *Amato*'s requirement that PPS must have itself suffered an injury. Hence I respectfully dissent and would affirm the District Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-937

PENNSYLVANIA PSYCHIATRIC SOCIETY,
Plaintiff,

v.

GREEN SPRING HEALTH SERVICES, INC., MAGELLAN HEALTH SERVICES, INC., HIGHMARK, INC., KEYSTONE HEALTH PLAN WEST, INC., KEYSTONE HEALTH PLAN CENTRAL, INC., AND KEYSTONE HEALTH PLAN EAST, INC.,
Defendants.

MEMORANDUM ORDER

On June 16, 1999, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(A) and (B), and Local Rule 72.1.3.

The magistrate judge's report and recommendation, filed on February 15, 2000, recommended that defendants' motions to dismiss the amended complaint (Docket #33 and #36) be granted, and that plaintiff's motion for preliminary injunction (Docket #42) be denied as moot. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all counsel by first-class mail on February 15, 2000. Objections were filed by plaintiff on March 2, 2000 (Docket #50), and on March 15, 2000, defendants filed a joint response to plaintiff's objections

(Docket #52). After *de novo* review of the pleadings and documents in the case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 24th day of March, 2000,

IT IS HEREBY ORDERED that defendants' motions to dismiss the amended complaint (Docket #33 and Docket #36) are granted, and that plaintiff's motion for preliminary injunction (Docket #42) is denied as moot.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated February 15, 2000 (Docket #49), is adopted as the opinion of the court.

/s/_____

GARY L. LANCASTER
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-937

PENNSYLVANIA PSYCHIATRIC SOCIETY,
Plaintiff,

v.

GREEN SPRING HEALTH SERVICES, INC., MAGELLAN HEALTH SERVICES, INC., HIGHMARK, INC., KEYSTONE HEALTH PLAN WEST, INC., KEYSTONE HEALTH PLAN CENTRAL, INC., AND KEYSTONE HEALTH PLAN EAST, INC.,
Defendants.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. *RECOMMENDATION*

It is respectfully recommended that defendant's motions to dismiss the amended complaint (Docket # s 33 and 36) be granted, and that plaintiff's motion for preliminary injunction (Docket # 42) be denied as moot.

II. *REPORT*

This is an action filed by a non-profit, voluntary association, the Pennsylvania Psychiatric Society (PPS), which has as its members certain licensed psychiatrists who practice in the Commonwealth of Pennsylvania. PPS purports to sue on behalf of some of its members who have, it is alleged, been damaged by the actions of defendants. PPS also asserts

claims on behalf of patients, and potential patients, of its member psychiatrists.

Defendant Green Spring Health Services (Green Spring) provides a network of psychiatrists and administrative services to managed health care plans. Magellan Health Services (Magellan) is the corporate parent of Green Spring. Defendants Highmark Inc., Keystone Health Plan West, Inc., Keystone Health Plan Central, Inc., and Keystone Health Plan West, Inc. (collectively referred to as the "HMOs") are health management organizations which contract with Green Spring for the provision of mental health and substance abuse related benefits.

The contractual relationships among the parties are as follows. The HMOs provide health care benefits primarily through employee benefit plans. Green Spring administers the provision of behavioral health and substance abuse services under contract to the HMOs, and provides a network of psychiatrists to service the mental health/substance abuse components of health plans (the Provider Network). The contracts between the HMOs and Green Spring are known as Managed Care Service Agreements. Individual psychiatrists contract with Green Spring pursuant to Provider Participation Agreements through which individual psychiatrists agree to render mental health and/or chemical dependency treatment service to individuals covered by benefit plans. The subscribers to HMO plans receive treatment from the psychiatrists through the plan offered by their HMO, as administered by Green Spring.

The amended complaint in this case sets forth several allegedly improper actions taken by Green Spring and the HMOs which, it is alleged, are designed to maximize their profits at the expense of PPS members and of the HMO subscribers. PPS alleges that this profit maximization is accomplished by the following means: "(1) refusing to credential physician applicants [to the Provider Network], or creating insurmountable obstacles to physician credentialing ([Amended Complaint] ¶¶ 38-44); (2) imposing overly-burdensome administrative requirements that make providing timely, medically appropriate treatment to patient-subscribers virtually impossible (*Id.*, ¶¶ 45-48, 63-65); (3) failing to pay PPS-member psychiatrists for services rendered, or delaying payments for 'clean claims' beyond the 45-day time limit

imposed by section 2166 of the Quality Health Care Accountability and Protection Act (¶¶ 49-51); (4) interfering directly with physician-patient relations (*Id.* ¶¶ 52-53, 74-76); (5) impermissibly discriminating against PPS-member psychiatrists based on profit-driven criteria, their practice specialty, and their geographic location (*Id.* ¶¶ 54-62, 77-79); (6) giving overly-restrictive treatment authorizations that undermine the quality of care received by patient-subscribers (¶¶ 63-70); and (7) making determinations concerning the level and quality of care received by patient-subscribers based on arbitrary criteria that are not based upon medical necessity. (¶¶ 71-73)." (Docket # 39 at 6-7). PPS further alleges that these administrative practices have placed some patient-subscribers in mortal danger, and caused needless suffering by others. PPS further alleges that its members have suffered "financial and professional detriment" from Green Spring's alleged practices. PPS seeks equitable relief to "reform defendants' flawed policies" and "ancillary damages" suffered by PPS members and patient-subscribers (Docket # 39 at 7).

The amended complaint is in eight counts. In Count I, PPS alleges that defendants have breached their contractual obligation to authorize and provide reimbursement for medically necessary and appropriate treatment by directly refusing to provide such authorization, and by imposing administrative burdens that prevent the provision of such care. PPS seeks a declaration that defendants have violated the terms of the Provider Agreements, and also seeks monetary damages.

Counts II and III also allege breaches of the Provider Agreements. In Count II, PPS alleges that defendants have interfered with PPS-member psychiatrists' obligation to render services "within the applicable standard of care" (Docket # 39 at 8). In Count III, a breach is alleged due to the termination of certain PPS-members in a manner inconsistent with the Provider Agreements. PPS seeks declaratory relief with at both counts, but monetary damages only at to Count II.

PPS alleges a breach of the contractual duty of good faith and fair dealing in taking the above-described actions, and seeks both declaratory and monetary relief.

In Count V, PPS alleges that defendants interfered with its members' relationships with their clients. Count VI is a claim of tortious interference with the physician-client relationship in that defendants have attempted to influence the subscribers' willingness to seek treatment from PPS member psychiatrists. PPS seeks declaratory and monetary relief at Counts V and VI.

PPS alleges in Count VII that defendants fraudulently misrepresented both the quality and level of care available under their plans. These misrepresentations were allegedly made to both patient-subscribers and to PPS-member psychiatrists who joined the Provider Network. Declaratory and injunctive relief is requested on behalf of PPS members and patient-subscribers, as well as monetary damages.

The final count, Count VIII, is brought on behalf of patient-subscribers for false representations which, it is alleged, violate the provisions of Pennsylvania Unfair Trade Practices and Consumer Protection Law "UTPCPL", 73 P.S. § 201-1. PPS seeks damages on behalf of the patient-subscribers.

Defendants filed motions to dismiss asserting that PPS lacks standing, and that the claims must be heard in arbitration as set forth in the Provider Agreements (Docket # s 19, 21, 23, and 25). PPS filed an amended complaint (Docket # 29) which the court concluded mooted these motions. Defendants have again filed motions to dismiss (Docket # s 33 and 36), this time addressed to the amended complaint, and again raising the same standing and arbitration arguments. Defendants have also filed briefs in support of their motions (Docket # s 34 and 37). PPS has responded (Docket # 39), the motions were argued, and the motions are now ripe for disposition.

STANDING TO MAKE CLAIMS FOR PPS MEMBERS

The initial question posed by defendants' motions to dismiss is whether PPS has standing to raise the claims presented in this case. PPS does not allege that it has suffered harm and, hence, it may sue only if it satisfies the test set forth in *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343 (1977):

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

For purposes of the motions to dismiss, defendants concede that the first two prongs of the *Hunt* test are met. Defendants assert, however, that the amended complaint fails to allege facts which would permit a court to find that PPS has standing to assert claims on behalf of its members. In this respect, the court is obligated to apply the familiar standard for Rule 12(b)(6) review, i.e., the court must accept as true all material allegations and construe the compliant in the light most favorable to the complaining party. *Hospital Council of Western Pennsylvania v. City of Pittsburgh,* 949 F.2d 83, 86 (3d Cir. 1991).

The third prong of the test for associational standing can be broken down into two parts. The first part addresses the need for participation by association members in proving the claims, while the second part is addressed to involvement by individual association members in establishing damages. "[C]laims for monetary relief necessarily involve individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the *Hunt* test." *United Union of Roofers, Waterproofers, and Allied Trades No. 40 v. Insurance Corporation of America,* 919 F.2d 1398, 1400 (9th Cir. 1990). Indeed, courts have routinely held that associations may not bring claims for monetary relief on behalf of their members. *Sanner v. Board of Trade of City of Chicago,* 62 F.3d 918, 923 (7th Cir. 1995) (collecting cases). In this case, PPS seeks monetary damages on behalf of its members with respect to the claims made in Counts I, II, IV, V and VI. Each of these claims necessarily will involve individual proof of damage and, hence, each claim runs afoul of the third prong of the *Hunt* test.[1]

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[1] PPS notes that the third prong of the *Hunt* test has been deemed "jurisprudential" rather than being of "constitutional magnitude" as are the first two prongs. *Food and Commercial Workers v. Brown Group, Inc.*, 517 U.S. 544, 556-58 (1996). In *Brown Group,* this conclusion

PPS argues that individual participation in the proof of breach of contract and damages can be presented without participation by individual PPS members. The court disagrees. Accepting as true the allegations of the complaint that certain types of claims are systematically rejected or are systematically approved for less treatment than is called for by the applicable standard, this inquiry will necessarily involve descriptions of the particular diagnoses and treatment which are assertedly being denied by defendants.

Further, it is not enough for PPS to argue, as it does, that the claims for monetary relief are "secondary" or "ancillary" to the requests for declaratory and injunctive relief. This is so because even if the sole claims made by PPS sought non-monetary relief, the third prong would nonetheless prevent PPS from making its member's claims for them.

Where an association's request for declaratory or injunctive relief does not require participation by its members, the courts have allowed the claims to be made by an association. *Hospital Council,* 949 F.2d at 89. In fact, in *Hospital Council,* the Court of Appeals for the Third Circuit rejected an argument premised upon the third prong of the *Hunt* test because "[n]either the district court nor the defendants have explained why the declaratory and injunctive relief sought by the Council in this case would have required participation by individual Council members." *Id.* Thus, the mere fact that monetary damages are not at issue is not enough, of itself, to satisfy the third prong. "Even when an association requests an injunction, the claim it asserts may be such that it cannot be resolved on an association-wide basis." *NACS v. Cambridge University Press,* 990 F.Supp. 245, 248 (S.D.N.Y.1997).

In this case, PPS asserts a variety of alleged breaches of the contracts between its members and the defendants. It is alleged that defendants have: refused to credential physician applicants; created insurmountable obstacles to physician

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permitted a finding that Congress was able to, and did, abrogate this requirement with respect to WARN Act claims brought by Unions on behalf of their members. Here, however, PPS makes claims sounding in breach of contract and tort as to which no Congressional abrogation of the final prong of the *Hunt* test has occurred. Hence, PPS's reliance upon *Brown Group* is misplaced.

credentialing; imposed overly-burdensome administrative requirements; failed to timely pay PPS-member psychiatrists for services rendered; interfered directly with physician-patient relations; discriminated against PPS-member psychiatrists based on profit-driven criteria; given overly-restrictive treatment authorizations; and made determinations concerning the level and quality of care received by patient-subscribers based on criteria other than medical necessity. Each of these asserted improper actions on the part of defendants requires participation by the individual PPS member who applied for credentialing, made the diagnosis for which treatment was not approved, or applied for benefits which were not timely paid. It may be, as PPS asserts, that it seeks "broad-based changes" in the procedures utilized by Green Springs. In order, however, to prove that such "broad based" changes are warranted, PPS will have to establish that the alleged abuses occurred. To do this, proof of specific instances of the types of asserted improper conduct will be necessary. Hence, PPS lacks standing to sue on behalf of its members, since proof of the claims, and of the damages suffered, will necessarily entail the involvement in this litigation of PPS members.

STANDING TO MAKE CLAIMS ON BEHALF OF PATIENTS

Defendants also challenge PPS's standing to assert claims on behalf of patients who have been treated by, or who may in the future be treated by, PPS's member psychiatrists. In this respect, it would be inappropriate to apply the test for associational standing since none of the patients is a member of PPS. *Amnesty America v. County of Allegheny,* 822 F.Supp. 297 (W.D.Pa.1993) (no associational standing where alleged injured parties are not members of plaintiff association); *Pharmaceutical Association v. Commonwealth of Pennsylvania, DPW,* 542 F.Supp. 1349 (W.D.Pa.1982) (association of pharmacists could not make claims on behalf of member's customers). PPS defines the individuals it purports to represent as "persons who subscribed to managed care plans offered in the Commonwealth of Pennsylvania, which are administered by Green Spring and Magellan, and/or who are patients of PPS-member psychiatrists." (Docket # 39 at 4). The court interprets this as including patients or potential patients of PPS members who are

subscribers to HMOs which utilize Green Spring as a managed care provider. As set forth above, PPS purports to raise claims of fraud under both common law and pursuant to the UTPCPL on behalf of these "patient-subscribers."

Third-party standing exists when the plaintiff itself has suffered concrete injury, and consideration of other factors weigh in favor of permitting the plaintiff to raise claims on behalf of a non-litigant. *Amato v. Wilentz*, 952 F.2d 742, 749 (3d Cir. 1991). The "concrete injury" requisite satisfies Article III requirements, while the remaining considerations are prudential in nature, and are weighed in a balancing test. *Wheeler v. Travelers Insurance Co.*, 22 F.3d 534, 537 (3d Cir. 1994) (standing involves both the "case and controversy" requirements of Article III and other prudential concerns). These factors are: (1) the potential conflicts of interest between the litigant and the third party; (2) any obstacles to suit by the third party; and (3) the closeness of the relationship between the litigant and the third party. *Id.*

In this case, PPS does not allege that it has itself suffered concrete injury. PPS alleges, instead, that its members have suffered such injury. Thus, at most, PPS has alleged that its individual members may meet the concrete injury requirement for third-party standing with respect to their patients. PPS has not, however, alleged facts from which the court can find that PPS itself has such standing. Thus, PPS cannot meet the preliminary requirement for third party standing, and the claims made on behalf of the patient-subscribers must be dismissed.

Even, however, if the court proceeded to the balancing test for third party standing, this would not benefit PPS. Although there are no apparent conflicts of interest between PPS and the patient-subscribers it seeks to represent, there appears to be no impediment to the patients seeking to enforce their legal claims themselves. Individual patients who believe that they are not receiving the benefits for which they have contracted are faced with no "affirmative obstacle to suing" and, further, they have "practical incentive to sue" since it is they who suffer the alleged denial of needed treatment. *Amato*, at 751.[2]

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[2] PPS asserts that patients seeking mental health and/or drug abuse treatment will be reluctant to sue due to the stigma attached to mental

Further, the court finds that the "relationship" between PPS and the patient-subscribers is so attenuated as to weigh against permitting PPS to bring suit on behalf of persons with which it has no direct relationship. PPS has no standing to litigate any claims on behalf of patients of PPS-member psychiatrists.

PRUDENTIAL STANDING

Defendants assert that principles of prudential standing, considered apart from the existence of Article III standing, also support their motion to dismiss. "No single formula is capable of answering every prudential standing question." *Conte Brothers Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 225 (3d Cir. 1998). There are three considerations which are "typically invoked" in considering whether a party has satisfied the test for prudential standing: "(1) that a litigant 'assert his own legal interests rather than those of third parties,' (2) that courts 'refrain from adjudicating abstract questions of wide public significance which amount to generalized grievances,' and (3) that a litigant demonstrate that the asserted interests are arguably within the 'zone of interests' intended to be protected by the statute, rule or constitutional provision on which the claim is based." *Id.*, at 226. *Citing, Wheeler, supra,* 22 F.3d at 538.

First, with respect to the entire lawsuit, defendants argue that PPS is attempting to litigate the rights of third parties, and not rights which it possesses. The court agrees. "[T]he first step in satisfying prudential standing is for the litigant to demonstrate that it has asserted its own legal interests rather than those of third parties." *UPS Worldwide Forwarding v. United States Postal Service,* 66 F.3d 621, 627 (3d Cir. 1995). In this case, PPS has no legal right of its own which it seeks to vindicate. Thus, even if the requirements of Arti-

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health and substance abuse problems. This, however, is not the type of "affirmative obstacle" to which the *Amato* court is referring. There is no legal impediment to suit by the patients. Nor is the stigma attached to the type of treatment sought an "affirmative obstacle" to suit. Instead, it is, at most, a disincentive to suit. The court finds this argument unpersuasive, particularly since PPS alleges that defendants have placed some patients in mortal danger. *See, e.g., Amato,* 952 F.2d at 751 (disincentive to sue must be overwhelming to equal "affirmative obstacle" to suit).

cle III were satisfied, prudential considerations would mandate that the motions to dismiss be granted in this case.

Further, even if PPS and some interest of its own upon which it was suing, it would not meet the "zone of interest" test identified above with respect to the claims asserted on behalf of patient-subscribers. Here, the "rule or statute" sued upon with respect to the subscribers in Count VII is a common law fraud claim. PPS is not within the "zone of interests" which the common law seeks to protect by granting to patient-subscribers a claim of fraud against defendants. This conclusion applies as well to the claim in Count VIII premised upon Pennsylvania's UTPCPL. Nothing in that statute grants to PPS any interest whatsoever. Hence, no interest of PPS may be said to be within the zone of interests protected by the common or statutory law relied upon.[3]

The court is not convinced that PPS has brought claims which are mere "generalized grievances." While this case is pregnant with issues constituent to the ongoing public debate concerning managed health care, it is framed upon the contractual relationship between PPS members and the defendants. Hence, the court cannot, on the face of the pleadings, determine that the true issue here is a generalized grievance concerning managed care.

MANDATORY ARBITRATION

Defendants also assert that each of the claims raised by PPS would be the subject of mandatory arbitration if brought by individual PPS members. Hence, the individual members of the Provider Network should not be permitted to circum-

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[3] The UTPCPL provides that suit may be filed by a "person who purchases or leases goods or services". 73 Pa.C.S. § 201-9.2. Here, the persons entitled to sue under the statute are clearly the patients who subscribed to the HMO. No Pennsylvania court has permitted a non-party to a contract to sue on behalf of consumers under the UTPCPL. PPS's argument that Pennsylvania law permits suit on behalf of consumers by a party with "valid representative capacity" proves too much. PPS cites to *Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc*, ___ Pa.Super. ___, 574 A.2d 641, 645 (1990). In *Forge Towers*, a condominium association itself contracted with the defendant on behalf of its members. Hence, the condominium association had standing since it was a party to the contract. Here, no comparable situation exists.

vent the arbitration provision by having their claims brought by an association of which they are members, but which itself is not party to the Provider Agreements. The court notes at the outset that avoidance of an arbitration provision by suing through a surrogate is simply not an appropriate use of associational standing. "Under the Federal Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Memorial Hospital v Mercury Construction Corporation*, 460 U.S. 1, 20 (1983). *See also, Isidor Paiewonsky v. Sharp Properties*, 998 F.2d 145, 155 (3d Cir. 1993) (citing cases where arbitration agreement upheld even though rights of non-parties to arbitration would be effected). Here, it cannot be more clear that any arbitration agreement which binds the individual members of PPS would likewise be binding upon PPS suing in a representational capacity.

The Provider Agreements pursuant to which PPS members participate in Green Spring's Provider Network each contain an identical arbitration provision:

> Resolution of Disputes. In the event that a dispute between Green Spring and Provider arises out of or is related to this Agreement, the parties to the dispute agree to negotiate in good faith to attempt to resolve the dispute. In the event the dispute is not resolved within 30 days of the date one party sent written notice of the dispute to the other party, and if any party wishes to pursue the dispute, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association.... If the dispute pertains to a matter which is generally administered in accordance with Green Spring's procedures involving, for example, credentialing or quality assurance, the procedures set forth by Green Spring must be fully exhausted by Provider before Provider may invoke its right to arbitration under this Section. Provider acknowledges that the recommendation and determination of whether Health Services are Medically Necessary shall be made in accordance with Green Spring's policies and procedures and shall not be subject to this Section 10.

(Docket # 29, Exhibit D at § 10.1(a)).

The arbitration provision, by its express terms, applies to all manner of credentialing disputes, as well as to matters involving quality of care. Likewise, issues of payment to providers are matters which necessarily fall within the provision as involving matters arising from the contract. Thus, PPS may not raise any claims premised upon these matters in this court. Instead, PPS members must proceed to arbitration on such claims.

PPS makes several arguments against application of the arbitration provision. First, PPS argues that the provision was not meant to encompass "broad-based, systemic challenges" to defendants' polieies, procedures and practices. The claims in this case, however, sound in breach of contract and tort. The arbitration provision expressly includes disputes arising under the Provider Agreements. Further, the tort claims raised in this case may fairly be said to relate to the performance, or not, of the parties' contractual obligations. Thus, all of the claims raised by PPS relate to and arise under the Provider Agreements. Hence, this argument is not persuasive.

Second, PPS argues that matters concerning the determination of medical necessity are not included within the arbitration provision. While this is true, this case also involves claims premised upon late payments, credentialing and (for want of a better term) administrative requirements which manifestly do not involve determinations of medical necessity. Again, this court cannot address claims which, at least in part, must first proceed to arbitration.

Third, PPS argues that it brings claims on behalf of members who have been refused credentialing and, hence, who are not parties to a Provider Agreement. The court has been informed by the parties during a status conference that each of the PPS members who had difficulty with Green Springs' credentialing process have now been credentialed and approved by Greens Springs. This argument appears to be moot.

Fourth, PPS argues that resort to Green Springs' internal review process for medical necessity claims would be futile since those claims could not be brought collectively as they have been here, but would instead be reviewed on a case-by-case basis. There is no allegation in the amended complaint

that any PPS member has in fact resorted to Green Springs' review procedure and found that procedure unavailing. Allegations of futility in this case cannot be credited. Indeed, PPS does not argue that its members are unable to raise their claims, instead, PPS argues that each claim will be addressed individually during the review procedures, and that PPS would prefer to bring them collectively in this forum. Perceived convenience in one forum is not proof of futility in another.

Finally, PPS asserts that the contract is one of adhesion because PPS-member psychiatrists had no choice but to enter into the agreement to arbitrate, and that they "cannot exercise their right to arbitrate for fear of retaliatory termination by Green Spring." Thus, it is further asserted that the arbitration clause provides a "sham" remedy, and that this court can choose not to enforce it. The court has the power to invalidate an agreement to arbitrate where the party challenging the contract lacked a meaningful choice in accepting the provision and the arbitration provision unreasonably favors the party asserting it. *Harris v. Green Tree Financial Corporation,* 183 F.3d 173, 181 (3d Cir. 1999). PPS has alleged facts sufficient to establish the first prong of the test, but fails to do so with respect to the second.

The arbitration provision is, on its face, neither more nor less favorable to Green Springs than it is to PPS members. PPS seeks to establish the second prong of the test by alleging that Green Spring's right to terminate provider agreements with 90 days notice and without cause[4] makes the arbitration provision a sham since Green Springs can terminate any provider who actually pursues his or her right to arbitration. PPS does not allege, however, that any such terminations have either occurred or been threatened. The court will not assume, as it has been invited to do, that a party to a contract will exercise its rights thereunder in a vindictive fashion, and will not invalidate an arbitration agreement on the basis that such action is possible.

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[4] The Provider Agreements give both Green Springs and the provider the right to so cancel the agreement.

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that defendants' motions to dismiss the amended complaint (Docket # s 33 and 36) be granted, and that plaintiff's subsequently filed motion for preliminary injunction (Docket # 42) be denied as moot.

In accordance with the Magistrate's Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

/s/_____
Kenneth J. Benson
United States Magistrate Judge

Dated: February 15, 2000

APPENDIX D

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 00-3403

PENNSYLVANIA PSYCHIATRIC SOCIETY,
Appellant,

v.

GREEN SPRING HEALTH SERVICES, INC.;
MAGELLAN HEALTH SERVICES, INC.; HIGHMARK, INC.;
KEYSTONE HEALTH PLAN WEST, INC.; KEYSTONE HEALTH
PLAN CENTRAL, INC.; KEYSTONE HEALTH PLAN EAST, INC.

(D.C. Civ. No. 99-cv-00937)

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE, BARRY, AMBRO and FUENTES, Circuit Judges.

The petition for rehearing filed by appellees Green Spring Health Services, Inc. and Magellan Health Services, Inc. and the petition for rehearing filed by appellees Highmark, Inc., Keystone Health Plan West, Inc., Keystone Health Plan Central, Inc. and Keystone Health Plan East, Inc. in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court en banc, are denied.

BY THE COURT,

/s/_____
Anthony J. Scirica
Circuit Judge

Dated: March 11, 2002

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

June 4, 2002

Mr. John G. Roberts
Hogan & Hartson
555 13th Street, NW
Washington, DC 20004

Re: Green Spring Health Services, Inc. et al.
v.
Pennsylvania Psychiatric Society
Application No. 01A943

Dear Mr. Roberts:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on June 4, 2002, extended the time to and including July 10, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By: /s/
Clayton R. Higgins, Jr.
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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NOTIFICATION LIST

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